Danaharta Urus Sdn Bhd v Hipa Corp Sdn Bhd (In Liquidation) & Anor

HIGH COURT (TAWAU) — ORIGINATING SUMMONS NO T(24)–37 OF 2003
LINTON ALBERT J
1 MARCH 2005

Banking — Bank and banking business — Conclusive evidence clause — Conclusiveness of certificate of indebtedness — Whether binding on parties to loan facilities

Civil Procedure — Locus standi — Sale of land — Whether bare trustee being third party to loan facility can question validity of debt due between borrower and lender

Words and Phrases — 'any other person' — Pengurusan Danaharta National Berhad Act 1998 s 14(6)(i)

The first defendant obtained a loan from Bank Bumiputra Malaysia Bhd ('the Bank') to purchase a parcel of land ('the property') from the second defendant and fully paid the purchase price. A memorandum of transfer to transfer the property from the second defendant to the first defendant and a memorandum of charge in favour of the Bank were executed but were not registered with the Central Land Office. The title deed to the property was deposited with the Bank. Thus, there was then an equitable charge on the property and the second defendant was a bare trustee having divested itself of all its interest in the property. The plaintiff acquired from the Bank all its powers rights interest and title in the property by virtue of a vesting certificate issued under s 14 of the Pengurusan Danaharta National Berhad Act 1998 ('the Act'). A winding-up order was later made against the first defendant which prompted the plaintiff to recall the loan. The first defendant failed to repay the loan. The plaintiff commenced these proceedings under O 83 Rules of the High Court 1980 ('RHC') seeking *inter alia* an order to sell the property. The second defendant opposed the plaintiff's application *inter alia* on the following grounds: (i) that there was no evidence of proved debt due to the plaintiff by the first defendant. It was however submitted for the plaintiff that the second defendant lacked *locus standi* because it was just a bare trustee. The plaintiff argued that the second defendant had no interest in the issues raised in the proceedings because the second defendant had no interest in either the debt or the property; and (ii)that there was non-compliance with O 83 r 3 of the RHC 1980 because the certificate of indebtedness fell far short of its requirements.

Held, allowing the plaintiff's application:

(1) It was patently clear that the second defendant did not have the standing to question the existence of the proved debt due from the first defendant to the plaintiff (see para 7).

(2) The certificate of indebtedness issued by the plaintiff was conclusive of the indebtedness because it was issued by virtue of section 16.10 of the facilities agreement between the Bank and the first defendant pursuant to the loan and was binding on the parties (see para 8).

(3) The criticism made by the second defendant as to the correctness of the debt and how it was arrived at were caught by s 14(6)(i) of the Pengurusan Danaharta National Berhad Act 1998 Act (see para 8).

(4) The words 'any other person' in s 14(6)(i) of the Act is interpreted to include the plaintiff in order to fulfil the purpose of the Act. The plaintiff's reliance on s 14(6)(i) was therefore, justified (see para 9); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 followed.

(5) Although there was merit in the second defendant's contention that there was non-compliance with O 83 r 3 of the RHC 1980, this was not fatal to the plaintiff's case. The omissions here cannot be said to have prejudiced the second defendant (see para 14); *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 followed.

[**Bahasa Malaysia summary**

Defendan pertama telah mendapatkan pinjaman daripada Bank Bumiputra Malaysia Bhd ('Bank tersebut') untuk membeli sebidang tanah ('harta tersebut') daripada defendan kedua dan telah membayar harga belian dengan sepenuhnya. Satu memorandum perlaksanaan pindahmilik untuk memindahmilik harta tersebut daripada defendan kedua kepada defendan pertama dan satu memorandum gadaian berpihak kepada Bank telah dilaksanakan tetapi tidak didaftarkan dengan Pejabat Tanah. Suratikatan hakmilik untuk harta tersebut telah diberikan kepada Bank. Oleh itu, terdapat satu gadaian ekuiti ke atas harta tersebut dan defendan kedua merupakan 'bare trustee' kerana telah dengan sendirinya melucutkan semua kepentingannya di dalam harta tersebut. Plaintif telah memperoleh daripada Bank semua kuasa hak kepentingan dan hakmilik dalam harta tersebut di bawah satu sijil letakhak yang dikeluarkan di bawah s 14 Akta Pengurusan Danaharta National Berhad 1998 ('Akta tersebut'). Satu perintah penggulungan telah kemudiannya dibuat terhadap defendan pertama dan ini telah menyebabkan plaintif menarik balik pinjaman tersebut. Defendan pertama telah gagal membayar balik pinjaman tersebut. Plaintif telah memulakan tindakan ini di bawah A 83 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') dan memohon *inter alia* satu perintah jualan untuk harta tersebut. Defendan kedua telah menentang permohonan plaintif *inter alia* atas alasan-alasan berikut: (i) bahawa tidak ada keterangan mengenai hutang yang terbukti yang perlu dibayar kepada plaintif oleh defendan pertama. Plaintif sebaliknya berhujah bahawa defendan kedua tidak mempunyai *locus standi* kerana ia adalah hanya 'bare trustee'. Plaintif berkata bahawa defendan kedua tidak mempunyai kepentingan dalam isu-isu yang dibangkitkan di dalam prosiding ini kerana defendan kedua tidak ada kepentingan di dalam hutang

atau harta tersebut; dan (ii) bahawa terdapat ketidakpatuhan dengan A 83 k 3 KMT 1980 kerana sijil keberhutangan tidak memenuhi keperluan-keperluannya.

Diputuskan, membenarkan permohonan plaintif:

(1) Adalah amat jelas bahawa defendan kedua tidak mempunyai asas untuk menyoal kewujudan hutang yang terbukti perlu dibayar oleh defendan pertama kepada plaintif (lihat perenggan 7).

(2) Sijil keberhutangan yang dikeluarkan oleh plaintif adalah konklusif berkenaan dengan keberhutangan tersebut kerana ianya telah dikeluarkan menurut seksyen 16.10 perjanjian kemudahan di antara Bank dan defendan pertama lanjutan daripada pinjaman tersebut dan adalah mengikat ke atas pihak-pihak (lihat perenggan 8).

(3) Kritikan oleh defendan kedua mengenai ketepatan hutang tersebut dan bagaimana ianya diperoleh adalah ditewaskan oleh s 14(6)(i) Akta Pengurusan Danaharta National Berhad 1998 (lihat perenggan 8).

(4) Perkataan 'any other person' dalam s 14(6)(i) Akta tersebut adalah ditafsirkan sebagai merangkumi plaintif supaya memenuhi tujuan Akta tersebut. Penggantungan plaintif di atas s 14(6)(i) adalah dengan itu wajar (lihat perenggan 9); *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 diikut.

(5) Walaupun ada merit dalam hujahan defendan kedua bahawa terdapat ketidakpatuhan dengan A 83 k 3 KMT 1980, ini tidak membawa padah kepada kes plaintif. Peninggalan di sini tidak boleh dikatakan sebagai telah memprejudiskan defendan kedua (lihat perenggan 14); *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 diikut.]

Notes

For cases on conclusive evidence clause, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) para 1667.

For cases on locus standi in sale of land, see 2(3) *Mallal's Digest* (4 th Ed, 2001 Reissue) para 3966.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12 (refd)

Citibank NA v Ibrahim bin Othman [1994] 1 MLJ 608 (refd)

Citibank NA v Ooi Boon Leong & Ors [1981] 1 MLJ 282 (refd)

Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener) [2004] 2 MLJ 257 (refd)

Maunsell v Orlins [1975] AC 373 (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281 (refd)

United Engineers (M) Bhd v Lim Kit Siang [1988] 2 MLJ 12 (refd)

Legislation referred to

Pengurusan Danaharta National Berhad Act 1998 ss 14, (6)(i)
Rules of the High Court 1980 O 1A, O 83, r 3
Sabah Land Ordinance (Cap 68)

Norbert Yapp (Jayasuriya Kah & Co) for the plaintiff.
Henry Mello (Insolvency Department) for the first defendant.
Cecil Robertson (C Robertson) for the second defendant.

Linton Albert J:

[1] The first defendant purchased from the second defendant the property consisting of a parcel of land situated in Tawau and described as town lease no 107524943 together with the hotel building thereon. The first defendant obtained a loan from Bank Bumiputra Malaysia Berhad (the Bank) to purchase the property which was sold for RM22,000,000. The purchase price was fully paid by the first defendant with the aid of the loan totaling RM16,000,000 disbursed in October 1994. A memorandum of transfer was executed to transfer the property from the second defendant to the first defendant and a memorandum of charge in favour of the Bank was also executed by the first defendant as security for the loan. The two documents were not registered with the Central Land Office although the latter was duly registered with the Registrar of Companies and the certificate of registration of charge duly issued. The title deed to the property was also deposited with the Bank. It is not disputed that in these circumstances there was then an equitable charge on the property and the second defendant was a bare trustee having no beneficial interest whatsoever in the property/the second defendant having divested itself of all its interest in the property (see *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12).

[2] The plaintiff acquired from the Bank all its powers rights interest and title in the property pursuant to and by virtue of a vesting certificate dated 31July 1994 issued under s 14 of the Pengurusan Danaharta National Berhad Act 1998 (the Act). A winding-up order was made against the first defendant on 22 February 2001 which prompted the plaintiff to require immediate repayment of the amount outstanding under the loan. The first defendant failed to repay the loan.

[3] The plaintiff commenced these proceedings under O 83 Rules of the High Court 1980 (RHC) by way of originating summons dated 30 June 2002 asking for an order to sell the property and among the numerous consequential reliefs asked for was an order for the first and second defendants to deliver or cause to be delivered vacant possession of the property. These were the only matters that could conceivably concern the second defendant and was accordingly so joined for those purposes.

[4] Perhaps with a view to avoid the expenses incurred and delay caused by these proceeding's the plaintiff was quick to grab the opportunity when it was suggested by one Datuk Hiew Min Yong (Datuk Hiew) the chief executive of the second defendant that a related company was in the process of obtaining an offshore loan which would be utilised to pay off the first defendant's debt. Apart from causing the lengthy delay, nothing came out of the efforts to reach an amicable settlement although in the process the plaintiff managed to squeeze some payments from Datuk Hiew and the second defendant towards payment of part of the interest due on the debt but the total amount was too minute to be of any significance.

[5] The second defendant opposed the plaintiff's application and filed an affidavit deposed to by Datuk Hiew who was also its director. Datuk Hiew's affidavit dealt almost exclusively with the unsuccessful efforts taken to reach an amicable settlement and the events which took place. The last paragraph of Datuk Hiew is relevant because it embodies the second defendant's opposition to the application and is, therefore, reproduced:

> The Plaintiffs claim of RM27,722,371.81 by their exh KA–9 is not admitted, nor is it evidence of proved debt due to the plaintiff by the first defendant. In the circumstances, I am advised and verily believe that the plaintiff is not entitled to the orders it seek by this originating summons.

[6] The response to this was the argument advanced by learned counsel for the plaintiff that the second defendant lacked *locus standi* because it had parted with the property by having executed the memorandum of transfer in favour of the first defendant and was just a bare trustee. Additionally, it was argued that the debt sought to be recovered by the sale of the property was that which was owed by the first defendant to the plaintiff. The debt was not disputed by the first defendant and these proceedings relate to the debt due from the first defendant to the plaintiff and the property which the plaintiff seeks to sell to recover the debt. It stands to reason that the second defendant has no interest in the issues raised in the proceedings because it is not suggested that the second defendant has any interest in either the debt or the property. In *United Engineers (M) Bhd v Lim Kit Siang* [1988] 2 MLJ 12 Abdul Hamid CJ (Malaya) had this to say at p 39:

> First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings.

[7] In my view this principle applies with equal force to a defendant in court proceedings and, in the words of Salleh Abas LP in that case, this is to protect the 'judicial process from abuse by busy bodies, cranks and other mischief-makers' (at p 29). It is patently clear that in the circumstances, the second defendant does not have the standing to question the existence of the proved debt due from the first defendant to the plaintiff. The plaintiff's response is, therefore, not without merit and is therefore sustained.

[8] Contrary to the views expressed by Cecil Robertson, counsel for the second defendant, I am inclined to agree with the submission of Norbert Yap, learned counsel for the plaintiff, that the certificate of indebtedness issued by the plaintiff was conclusive of the indebtedness because it was issued by virtue of section 16.10 of the facilities agreement between the Bank and the first defendant pursuant to the loan and was binding on the parties (see *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282). The criticism made by the second defendant as to the correctness of the debt and how it was arrived at are, in my view, caught by s 14(6)(i) of the Act which reads:

> Without prejudice to the generality of sub-s (1), (2), (3), (4), or (5), in any proceedings brought by or against the corporation in respect of any asset vested in the corporation pursuant to this section, no person shall raise as a claim or defence to such proceedings any of the following matters, unless such claim is a disclosed claim:
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> (a) …;
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> (b) …;
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> (c) …;
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> (d) …;
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> (e) …;
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> (f) …;
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> (g) …;
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> (h) …;
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> (i) there is an error in any statement of account issued by the seller or any other person in respect of any debt to which the asset relates.

[9] The contrasting views expressed by Mr Norbert Yapp and Mr Cecil Robertson concerning whether the words 'any other person' in s 14(6)(i) of the Act includes the plaintiff can be resolved by resorting to *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd (Bar Council Malaysia, Intervener)* [2004] 2 MLJ 257 a case of high authority cited by Mr Norbert Yapp where at p 285 Augustine Paul JCA delivering the judgment of the Federal Court said:

> Parliament's clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation's Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values. The appellant was thus given three principal duties. They are:
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> (a) acquisition of non-performing loans and assets;
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> (b) management of such assets, including by way of the appointment of special administrators to temporarily manage the affairs of corporate borrowers in place of their directors; and

A (c) disposition of the acquired assets. In order to accomplish these objectives the appellant was given sufficiently wide and broad statutory powers to acquire loans and credit facilities by way of statutory vesting; to manage the affairs of corporate borrowers through special administrators appointed to formulate work-out plans in order to repay debts owing to creditors, and finally to dispose of charge assets.

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[10] It seems to me sensible that s 14(6)(i) is interpreted to include the plaintiff in order to fulfil the purpose of the Act, a proposition consonant with the dictum of Lord Simon of Glaisdale in *Maunsell v Orlins* [1975] AC 373 at p 391:

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> …in statutes dealing with ordinary people in their everyday lives, the language is presumed to be used in its primary ordinary sense, unless this stultifies the purpose of the statute, or otherwise produces some injustice, absurdity, anomaly or contradiction, in which case some secondary ordinary sense may be preferred, so as to obviate the injustice, absurdity, anomaly or contradiction or fulfil the purpose of the statue.

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[11] The plaintiff's reliance on s 14(6)(i) was, therefore, justified.

[12] Although there is merit in Mr Cecil Robertson's contention that there was non-compliance with O 83 r 3 of the RHC 1980 because the certificate of indebtedness fell far short of its requirements, this is not fatal to the plaintiff's case. In *Citibank NA v Ibrahim bin Othman* [1994] 1 MLJ 608 an authority cited by the second defendant's counsel it was held that the objective of O 83 r 3 is to enable the defendant to know at least at the date the originating summons is filed, what is the exact sum he is legally liable to pay so that he can make up his mind to contest or pay up. Mahadev Shankar J went on at p 615 to state thus:

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> Provided evidence of the correct amount due has been put before the final hearing, the court has the power to dispense some omission to fulfil the rules to the letter, but only if no real prejudice will thereby result to the defendant.

G **[13]** Order 1A RHC 1980 also provides:

> In administering any of the rules herein the court or a judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.

H **[14]** The omissions here cannot by any stretch of the imagination be said to have prejudiced the second defendant. The second defendant's objection on this ground must therefore, fail. I have not considered the speculative opinions expressed by the second defendant's counsel relating to the propriety of not having the memorandum of charge registered and the applicability of the Sabah

I Land Ordinance (Cap 68) to these proceedings because these were matters that were not pleaded (see *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281) nor are they relevant for the determination of the plaintiff's application.

[15] I have for the reasons and in the circumstances aforesaid, allowed the plaintiff's application.

Plaintiff's application allowed.

Reported by Kanesh Sundrum

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